

May 27, 2008

Ms. Mable M. Granke  
1013 Scarborough Ave. Ext.  
Rehoboth Beach, DE 19971

**RE: Freedom of Information Act Complaint Against  
City of Rehoboth Beach Planning Commission**

Dear Ms. Granke:

On May 1, 2008, the Delaware Department of Justice (“DDOJ”) received your complaint alleging that the City of Rehoboth Beach Planning Commission (“RBPC”) violated the Freedom of Information Act (“FOIA”), 29 *Del. C.* § 10001 *et seq.* You allege that the public notice of the RBPC meeting of March 7, 2008 failed to accurately disclose what the RBPC expected to consider at that meeting. On May 2, 2008, we sent your complaint to the RBPC, and we received their response on May 12, 2008.

**Statement of the Facts**

In January, 2008 the RBPC denied an application for partition of a lot on Lee Street in the City of Rehoboth Beach. In February, 2008, the applicant submitted a request for reconsideration of the application pursuant to § 236-8.1(D) of the Rehoboth Beach Municipal Code, or in the alternative for a waiver of § 236-8.1(D).<sup>1</sup> The RBPC’s

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<sup>1</sup> Section 236-8.1(D) provides, “[t]he application for partition or minor subdivision of a parcel of land shall not be considered by the Planning Commission if within the twelve-month period immediately preceding the application the subject parcel was the subject of a subdivision application that was denied by the Planning Commission. However, this limitation shall not be applicable if the majority of the Planning Commission members then present find the facts and circumstances existing at the time of their prior decision have undergone a substantial change justifying their reconsideration, or if the prior application was returned for refiling as a major subdivision.” Section 236-8.1(D) does not provide for waiver .

public notice informed the public that the New Business for the March 7, 2008 RBPC meeting would include, as stated in the posted agenda:

- A. Request for Reconsideration of Partitioning Application No. 1107-05 for the property located at 507 Lee Street, Block Schoolvue D to be divided into two (2) lots, Lot A being 8,474 square feet and Lot B being 8,026 square feet, which had been denied by the Planning Commission at its January 11, 2008 meeting. The request for reconsideration was submitted by Chate T. Brockstedt, Esq. on behalf of the applicant, Lee Street 507, L.L.C. The request for reconsideration has been requested pursuant to Section 236-8.1(D) of the Rehoboth Beach Municipal Code.
- B. Subject to the Planning Commission's determination of the aforementioned reconsideration request, the Planning Commission may proceed with the Preliminary Review of Partitioning Application No. 1107-05 . . . .

At the March 7 meeting, the RBPC engaged in a "lively discussion," as you put it, concerning whether the applicant qualified for reconsideration under § 236-8.1(D). Ultimately, the RBPC voted to waive § 236-8.1(D), and proceeded with the Preliminary Review of the application.

#### **Relevant Statutes**

29 *Del. C.* § 10004(e)(2) requires public bodies to provide the public seven days' notice of the time, place and agenda (if one has been determined) for their regularly scheduled meetings. The agenda is defined as including a "general statement of the major issues expected to be discussed at a public meeting[.]" 29 *Del. C.* § 10002(a).

#### **Discussion**

Although the real issue here seems to be whether the Municipal Code allows for a waiver of § 236-8.1(D), FOIA does not address whether such waiver was a proper action.

Thus, the only question we can decide is whether the RBPC violated FOIA in voting to waive § 236-8.1(D) when the public notice of the meeting did not mention the waiver. In other words, was “request for reconsideration” a sufficient “general statement of the major issues expected to be discussed,” under FOIA or should the public notice have included a reference to the possibility that § 236-8.1(D) might be waived?

The purpose of FOIA is to “further the accountability of government” by insuring the public is able to “observe” and “monitor” decision-making by public officials. 29 *Del. C.* § 10001. Toward that end, the public must receive notice of meetings of public bodies, including any available agenda, and the agenda must contain “a general statement of the major issues expected to be discussed[.]” 29 *Del. C.* § 10002(a). The agenda “should be worded in plain and comprehensible language and must directly state the purpose of the meeting.” *Chem. Indus. Council of Del., Inc. v. State Coastal Zone Indus. Control Bd.*, 1994 WL 274295,\*8 (Del. Ch.). One of the purposes of the March 7 meeting of the RBPC was to reconsider the application to partition the Lee Street property. The agenda for the March 7 meeting clearly and plainly informed the public that the partition application would be reconsidered. Any member of the public who was concerned about the partitioning of the Lee Street property was on notice that it would be discussed and voted on at the March 7 meeting. The “major topic” was the reconsideration of the partition application, not waiver, which was simply the procedural means by which the RBPC disposed of the application.

We can distinguish *Ianni v. Dep't of Elections of New Castle County*, 1986 WL 9610, (Del. Ch.), which held that “when an agency knows that an important specific aspect of a general subject is to be dealt with[,]” it violates FOIA “to state the subject in such broad generalities as to fail to draw the public’s attention to the fact that a specific important subject will be treated.” *Id.* At \*5. In *Ianni*, the court ruled that the agenda item, “primary election,” was so broad as to be misleading, because the actual topic discussed and decided was consolidation of election districts for the primary election. The case before us, however, presents no *Ianni*-type problem. The reconsideration of the application to partition the Lee Street property was noticed in the posted agenda specifically and was the major subject discussed and decided at the meeting. The 236-8.1(D) waiver was the procedural mechanism by which the RBPC allowed the partition application to proceed to a Preliminary Review. It was not a separate and distinct topic in itself. Unquestionably, the RBPC’s waiver of an ordinance is a serious matter of significant public concern, but if the RBPC overstepped its authority in waiving a Municipal Code requirement, the remedy lies in some other action, not under FOIA.

We made a similar determination in *Att’y Gen. Op.* 06-IB-09, 2006 WL 1779490 (Del. A.G.), where the public notice described the meeting topic at issue as “Ordinance 05-05 – Dangerous Buildings – Final Reading” but in fact a motion passed to waive the final reading and proceed to a vote. As we stated there, FOIA does not require the public body to detail in the agenda “every possible course of action it might take in discussing”

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the agenda topic. *Id.* at \*3. Unlike in *Ianni* this situations is functionally indistinguishable from the instant case.

**Conclusion**

For the reasons stated herein, it is determined that the Rehoboth Beach Planning Commission did not violate FOIA by voting to waive the requirements of § 236-8.1(D) of the Municipal Code regarding a partition application, when the agenda stated that the topic under consideration would be a “Request for Reconsideration . . . pursuant to Section 236-8.1(D) of the Rehoboth Beach Municipal Code.”

Very truly yours,

Judy Oken Hodas  
Deputy Attorney General

APPROVED

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Lawrence W. Lewis  
State Solicitor

cc:

Glenn C. Mandalas, Esquire

Sarah Murray, Opinion Coordinator